Supreme Court, U.S.
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05-962

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

GREGORY LOTT *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

When a court evaluates a claim by a federal habeas petitioner that he is "actually innocent" of the crime (or sentence), under *Schlup v. Delo*, 513 U.S. 298 (1995) and/or *Herrera v. Collins*, 506 U.S. 390 (1993), the court must consider, per *Schlup*, "all the evidence," including evidence "that was either excluded or unavailable at trial." 513 U.S. at 327–28. The question presented is: Whether such a petitioner waives his attorney-client and work-product privileges regarding either statements the petitioner made to his former counsel or other evidence relevant to his actual innocence?

LIST OF PARTIES

The Petitioner is Marc Houk, the Warden of the Ohio Penitentiary at Youngstown.

The petitioner below, Gregory Lott, is an inmate of the Ohio Penitentiary, and a Respondent here. Because this case involves a mandamus action, the United States District Court for the Northern District of Ohio is also a Respondent here.

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A. Gregory Lott burglarized John McGrath's house, tied up the eighty-two-year-old McGrath and set him on fire, causing McGrath's eventual death. 5

B. A state court three-judge panel convicted Lott and sentenced him to death. 7

C. Lott challenged his conviction on direct appeal, in state post-conviction proceedings, and federal habeas. 8

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D. Lott filed a second federal habeas petition..... 11

E. The district court granted in part the Warden's counsel's discovery request seeking information with which to defend against Lott's actual innocence claim..... 12

F. The Sixth Circuit stayed discovery, and it granted a writ of mandamus against the district court with regard to the trial court's finding of an implied waiver of attorney-client and work-product privileges..... 14

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PETITION

The Attorney General of Ohio, on behalf of Marc Houk, the Warden of the Ohio Penitentiary in Youngstown, Ohio ("Ohio"), respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case granting mandamus against the district court's order allowing discovery.

OPINIONS BELOW

The United States Sixth Circuit Court of Appeals Opinion is reproduced at App. 1a–33a. The United States District Court for the Northern District of Ohio's Memorandum of Opinion and Order is reproduced at App. 34a–63a. The opinion of the Sixth Circuit authorizing Lott to file a second habeas petition appears at App. 83a–94a. The opinion of the Ohio Court of Appeals affirming the denial of Lott's second post-conviction relief petition is reproduced at App. 96a–113a. The Sixth Circuit's opinion denying Lott's first federal habeas petition appears at App. 114a–66a. The Ohio Supreme Court's opinion on direct appeal is reproduced at App. 167a–99a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals issued its opinion granting mandamus on September 9, 2005. The Warden sought and obtained an extension of time through January 27, 2006 to file a petition for certiorari to this Court. See App. 64a. The Warden timely filed his petition within the time allowed by that extension. The Warden invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix included with this brief.

INTRODUCTION

The decision below rejected the possibility that habeas petitioners who assert an "actual innocence" claim under *Schulp v. Delo*, 513 U.S. 298 (1995), impliedly waive the attorney-client and work-product privileges regarding contentions raised in their claims. Review of this issue is warranted now, because the ruling below threatens to undermine the finality of state court convictions and encourage proliferation of actual innocence claims as just one more habeas litigation tactic. Thus, this case merits this Court's consideration even though the federal courts of appeals other than the Sixth Circuit have yet to weigh in on the issue.

The Sixth Circuit below granted a writ of mandamus against the district court, which had granted in part the State's discovery request in Respondent Gregory Lott's second federal habeas action. The Sixth Circuit majority concluded that the district court had "clearly erred" in concluding that Lott had impliedly waived the attorney-client and work-product privileges as to his former counsel's notes, documents, and conversations with Lott, about the matters Lott raised in his verified habeas petition. Specifically, in his second petition, Lott contended that a police officer had fabricated Lott's confession nearly twenty years ago, and Lott also claimed that he was actually innocent based on exculpatory evidence that the prosecutor allegedly failed to disclose to Lott's trial counsel at Lott's original trial. The Warden sought discovery regarding whether Lott's trial counsel knew of the exculpatory information at trial, either

from the prosecutor or from another source, and whether Lott ever admitted to his former counsel Lott's role in the crime or his 1986 confession to police.

In overturning the district court's order pertaining to the privilege waiver, the Sixth Circuit held that although this Court's decision in *Schlup v. Delo* requires consideration of "all the evidence" in determining an actual innocence claim, regardless of its admissibility at trial, *Schlup* did not curtail the rules of attorney-client and work-product privilege. App. 16a–17a. The Sixth Circuit expressed concern that an implied waiver in the context of actual innocence claims would undermine the attorney-client privilege in other areas as well.

The Sixth Circuit's decision warrants review for four reasons. First, the decision below effectively allows habeas petitioners asserting actual innocence claims to hide the most relevant evidence as to their innocence. In defending against actual innocence claims, States must be permitted to ask about documents or statements that support or refute those claims, including statements that the habeas petitioner made to his former trial counsel. But if habeas petitioners know that they can maintain their innocence while withholding the best evidence relevant to their innocence, actual innocence claims are likely to be filed with increasing regularity, despite the Court's admonition that such claims are reserved for the "truly deserving." *Schlup*, 513 U.S. at 321. That prospect threatens to impinge upon the comity between federal and state courts in review of state convictions, and undermine the finality of those convictions.

Second, the Sixth Circuit's ruling is inconsistent with *Schlup*'s direction that when a court evaluates an "actual innocence" claim, the court must consider that contention "in light of all the evidence" relevant to a habeas petitioner's guilt or innocence. *Id.* at 328. *Schlup* focused on evidence *relevant* to *factual* guilt or innocence, not legal insufficiency. *Schlup*'s "all-the-evidence" mandate includes evidence that

was "excluded or unavailable at trial." *Id.* at 328. Thus, for example, it is not enough for a habeas petitioner claiming actual innocence to dismiss inculpatory evidence as having been obtained illegally. That evidence must be considered, as well as its reliability. In short, when federal courts undertake a *Schlup* "actual innocence" inquiry, the usual rules of admissibility are put aside. For similar reasons, the claimant's attorney-client and work-product privileges also must yield to the extent that otherwise privileged matters directly relate to contentions made in support of "actual innocence." An implied waiver of privilege in this context is consistent with *Schlup*, and with Fed. R. Evid. 501's direction that federal courts are to determine the scope of privilege "in the light of reason and experience."

Similarly, the ruling below is inconsistent with the understanding that a habeas petitioner asserting his actual innocence surrenders many of the constitutional privileges relating to trial. For example, the Court in *Schlup* cited an article opining that evidence seized in violation of the Fourth Amendment should be considered in determining actual innocence. 513 U.S. at 328 n.46. If relevant evidence obtained in violation of Fourth, Fifth, or Sixth Amendment privileges can be considered in evaluating an actual innocence claim, then relevant evidence claimed to be protected by the habeas petitioner's attorney-client privilege ought in fairness to be considered as well.

Third, even putting aside the *Schlup* aspect of the claim here, the decision below also muddies the law about implied waiver of attorney-client privilege more generally. Case law implying a waiver of the privilege in other contexts strongly suggests that an implied waiver of the privilege is appropriate when a claimant has directly put privileged material at issue by his contentions and the opposing party in fairness ought to have access to that material to defend against the specific contentions. *Schlup*'s mandate to consider "all the evidence"